In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1160

YICK CHIN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native and citizen of China, sought to enter the United States in April 1952 under a claim of derivative American citizenship (Pet. 4; Pet. App. C, iv; R. 22). In exclusion proceedings before a board of special inquiry, his claim of citizenship was rejected as unsupported by credible evidence and he was denied entry. The board's findings and order were sustained by the Board of Immigration Appeals on Au-

gust 18, 1952 (Pet. App. C, iv; R. 22-24).[1] Petitioner was thereafter paroled into the United States under bond for the purpose of enabling him to "prosecute an action under Section 503 [of the Nationality Act of 1940, 54 Stat. 1171]" (R. 4, 8). That section authorized persons claiming to be nationals of the United States whose claims had been denied by an executive department or official to seek to have their claims recognized in declaratory judgment proceedings (cf. Section 360 of the present Immigration and Nationality Act, 8 U.S.C. 1503). It does not appear whether such a proceeding was ever instituted; if a suit was filed it was evidently unsuccessful, since petitioner describes himself as a citizen of China (Pet. 4), and the present proceedings arose out of an attempt by petitioner to apply for a discretionary "suspension of deportation." For reasons not shown by the record, petitioner has remained in parole status in this country ever since (Pet. App. A, ii; Pet. App. C, iv).[2]

In 1966, petitioner requested the Board of Immigration Appeals to reopen the exclusion proceedings for the purpose of enabling him to file an application

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[1] So far as appears, no judicial review of the administrative proceedings was sought.

[2] Presumably it has not been possible or practicable to effect petitioner's removal to the country from where he came under recent international conditions. Petitioner was born in Kwangtung Province (on the Chinese mainland) and last resided there before coming to this country (R. 9). See also R. 11, where petitioner stated in his application for suspension of deportation that he was opposed to the Communist regime in China and that he feared political persecution if he returned to that country.

for "suspension of deportation" under Section 244 of the Immigration and Nationality Act (8 U.S.C. 1254) (Pet. App. C., iv-v). The motion was denied by the Board on the ground that Section 244 relates only to resident aliens who have been arrested in deportation proceedings and that petitioner was therefore ineligible for the relief sought (Pet. App. C, v).[3]

Petitioner thereafter filed in the Court of Appeals for the Ninth Circuit a petition for review of the Board's order under Section 106(a) of the Immigration and Nationality Act, as amended (75 Stat. 651, 8 U.S.C. 1105a(a)). The court of appeals, noting that the order sought to be reviewed had not been entered in the course of a proceeding under Section 242 (b) of the Act (8 U.S.C. 1252(b)) and was not ancillary to such a proceeding, held that the order was not reviewable by a court of appeals under Section 106(a). It accordingly dismissed the petition for want of jurisdiction (Pet. App. A).

DISCUSSION

The decision of the court of appeals is correct and no question meriting review by this Court is presented. Nor is there any reason to retain the instant case on the Court's docket pending decision in *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, No. 638, this Term, in which certiorari was granted on January 29, 1968.

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[3] The Board noted that excluded aliens who have been paroled into the United States are not residents in contemplation of law (Pet. App. C, v). See *Kaplan* v. *Tod*, 267 U.S. 228; cf. *Leng May Ma* v. *Barber*, 357 U.S. 185.

Section 106(a) of the Immigration and Nationality Act gives to the courts of appeals exclusive authority to review "all final orders of deportation heretofore or hereafter made against aliens within the United States *pursuant to administrative proceedings under section 242(b) of this Act* * * *" (emphasis added). Section 242(b) (8 U.S.C. 1252(b)) is the compendium of provisions under which special inquiry officers conduct quasi-judicial proceedings to determine the deportability from this country of resident aliens believed subject to expulsion. It has nothing to do with the exclusion of aliens who seek to enter. Exclusion proceedings are governed by a wholly different set of provisions, contained in Section 231-240 of the Act (8 U.S.C. 1221-1230). That Section 106(a) does not give courts of appeals reviewing authority with respect to orders of exclusion is clear not only from the terms of Section 106(a) itself, but also from Section 106(b) (8 U.S.C. 1105a(b)), which provides that an alien against whom a final order of exclusion has been entered may obtain judicial review of the order "by habeas corpus proceedings and not otherwise."

Petitioner is admittedly an alien who has been barred from entering this country in exclusion proceedings. The administrative paroling of him ashore did not affect his status as an excluded and therefore nonresident alien. *Kaplan* v. *Tod*, 267 U.S. 228; cf. *Leng May Ma* v. *Barber*, 357 U.S. 185. No order of deportation (within the sense of Section 106(a)) has been entered and no "administrative proceedings under section 242(b)"—the necessary preface to the entry of such an order—have been commenced or are contem-

plated. For this reason the question which has divided the courts of appeals concerning the scope of Section 106(a)—whether various kinds of determinations that are ancillary to or might affect the execution of final orders of deportation entered in proceedings brought under Section 242(b) are reviewable initially in courts of appeals (see *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217; *Giova* v. *Rosenberg*, 379 U.S. 18; *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 381 F.2d 542 (C.A. 3), pending on writ of certiorari, No. 638, this Term)—is in no way involved in this case. The decisions cited by petitioner as in conflict with the decision below in this case (Pet. 8-9) all involved aspects or facets of that question. No court has held or suggested that Section 106(a) gives authority to the courts of appeals to review orders of the immigration authorities wholly unrelated to deportation orders and in no way arising out of or relating to proceedings under Section 242(b). Since no order or aspect of an order in petitioner's case is reviewable under Section 106(a), no question of bifurcation of judicial review (see *Foti* v. *Immigration and Naturalization Service*, *supra*, 375 U.S. at 226-227, 232) is involved here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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